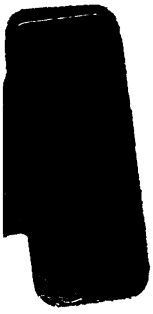

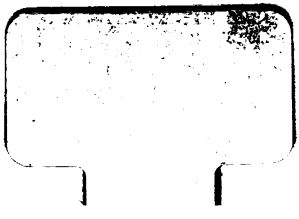

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NAVAL LAW AND NAVAL COURTS.

BY

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NAVAL LAW AND NAVAL COURTS.

(Address delivered by Chas. H. Lauchheimer, First Lieutenant, U. S. Marine Corps, at the War College, Newport, R. I., August 28 and 31, 1896.)

GENTLEMEN:

The subject assigned me by the President of this College—Naval Law and Naval Courts—is one of such magnitude that it has been quite a task to condense into two lectures such features as I trust will be not only interesting but at the same time instructive to the student of that branch of our profession which, I regret to state, has hitherto been neglected and not given that degree of attention which its importance merits. A knowledge of naval law is, in my humble opinion, necessary to the Naval officer who desires properly to perform the functions of his office, no matter what his rank or position may be. I have designed to preface my remarks with a brief history of naval law, and then to discuss the various tribunals which by statute are in force in the naval service, and which are known as Naval Courts.

NAVAL LAW.

Naval law is synonymous with military law, and in its restricted sense is the specific law governing the Navy as a separate community. Ordinarily and for all practical purposes military and naval law may be considered under the general head of military law, and hereafter in these lectures whenever the term military law is used, it is to be understood as including naval law, *i. e.*, I will speak of that branch of the law which governs the Army, Navy, and the Militia when called

into active service, but with special reference however to that branch thereof which pertains to the naval service.

At the very beginning may I ask your attention to the distinction between military and martial law, the latter being operative only in time of war or like emergency when the military government supersedes the civil, and has as its object the control of the respective armies and of those violating, in respect to said armies, the laws of war; whilst military law, as before stated, is the specific law governing the Army and Navy, in time of peace as well as war.

Historically considered, military law antedates the Constitution, but as, however, all law, both public and private, began to exist or operate anew from the time of this instrument, it is customary to designate the Constitution as the source of all military law. We have, therefore, only to look at that document to find the specific provisions which may be regarded as the source or sanction of our present military law and its jurisdiction, and they are as follows:

Congress is empowered "to define and punish offenses against the law of nations;" "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of land and naval forces;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;" and generally "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,"(*i. e.*, those set forth as well as others in the same section), "and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." The President, as Commander-in-Chief of the Army and Navy of the United States and of the militia of the

several states when called into the actual service of the United States, is empowered to appoint (in conjunction with the Senate) and to commission the officers of the Army and Navy, etc., and it is also made his duty "to take care that the laws be faithfully executed."

And perhaps the most important of all, the Fifth Amendment, which provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Military law, which as I have before stated, is operative both in peace and in war, is both written and unwritten, just as is the civil law.

The written military law, so far as it applies to the navy, is founded upon the statutory code known as the Articles for the Government of the Navy; other statutory provisions relating to the Navy; the Navy Regulations, and general and special orders issued by the Department.

The unwritten military law, while it has derived from the common law certain of its precepts and doctrines, has nevertheless an unwritten law distinctively its own, which consists of certain established principles and usages peculiar or pertaining to the naval service, and which, from their immemorial usage, are as well known to the officers of the service as are the doctrines of the common law to the lawyer. The customs of the service are recognized as binding on courts-martial, and in fact, by the act entitled "An act for the government of the Navy of the United States," approved March 2, 1799, it is provided that "every commander-in-chief and captain, in making private rules and regulations, and designating the duties of his officers, shall keep in mind also the customs and usage of the sea service most common to our nation." This, in effect, provides a statutory enactment for the recognition of the unwritten military law.

In our service the unwritten military law is very meagre, for from time to time the customs of the service have been embodied in the Navy Regulations, and have thus become part of the written military law. Still there does exist an unwritten military law, and perhaps it will not be out of place to state here that in order that a particular usage or custom may have the force of unwritten law, it must fulfill certain conditions, the most important of which are that it must be uniform, well defined, and equitable; must be of long standing; must be certain and reasonable, and not in conflict with statute or constitutional provisions, and must be so long continued and notorious that all persons concerned may be presumed to have knowledge of it. It must also refer to a subject upon which the written law is silent, and must not be prejudicial to discipline. It is essential that all these conditions be present in order that the custom or usage may come within the category of the unwritten law.

Naval law, therefore, as we find it, is principally statutory law, or regulations made in conformity therewith, and the customs of the service.

With this short review of what naval law is, we will pass to the consideration of those tribunals by which it is administered, *i. e.*, courts-martial and courts of inquiry, and will first trace briefly the origin and history, the nature as a legal tribunal, the constitution, the composition and jurisdiction of courts-martial.

ORIGIN AND HISTORY.

Some form of tribunal for the trial of military offenses seems to have existed since the early history of armed forces. In Rome, justice was administered by the *Magistri militum*, and especially by legionary tribunes either as sole judges or with the assistance of councils. Among the early Germans, in times of peace the courts were held by the counts, assisted by the freemen, but in time of war by the duke or military chief, who generally delegated this authority to the priests who

accompanied the army; later, courts of regiments were formed, and the matter was left to the colonel of the regiment, who could, however, delegate his authority to an officer by investing him with the staff or mace called the *regiment* as the emblem of judicial authority. Courts-martial proper (Militär-gerichts), however, probably date from the Articles of War promulgated in the time of Frederick III, 1487; they (the courts) were specifically provided for in the penal code of Charles V, although more accurately defined in the articles of Maximilian II, of 1570. In France, courts-martial (conseils de guerre) were first established by the ordnance of 1655. Previous to this, military prisoners were subjected to the jurisdiction, successively of the Mayor of the Palace, the Grand Seneschal, the Constable, and the Provost-Marshal. In England, the original of the modern court-martial is seen in the "King's Court of Chivalry," or as it was also called the "Court of Arms" or the "Court of Honor," of which the judges were the Lord High Constable and the Earl Marshal. These officials also formed part of the "Aula Regis" of William the Conqueror, but it was not until the sub-division of that tribunal into separate courts by Edward I, in the latter part of the 13th century, that the Court of Chivalry had an independent existence; as thus constituted its jurisdiction was an extended one applying to matters both civil and criminal, and touching "all matters of honor and arms," "pleas of life and member arising in matters of arms and deeds of war," "the rights of prisoners taken in war," and also to "offenses and miscarriages of soldiers contrary to the rules of the army" and to "civil crimes and matters of contract." Owing to the extended jurisdiction accorded to this tribunal, it gradually encroached upon the common law courts and consequently it was, by various acts of parliament, gradually shorn of much of its power, and although never specifically abolished by statute, it had, nevertheless, before the English Revolution, practically ceased as a military tribunal. Subse-

quent to the decadence of the Court of Chivalry and preceding the first mutiny act, justice was administered by martial courts, or councils, convened in accordance with the articles of war then in force. During the reign of the Tudors and Stuarts and prior to the Petition of Right, military law, as administered, resembled martial law rather than military law of modern times, as civilians were tried by courts-martial and even the death penalty inflicted upon them in cases where the law of the land did not authorize such jurisdiction or punishment. Finally, by the mutiny act of 1689, the death penalty was prohibited except in certain cases and the Sovereign (for the first time by legislative authority) was expressly empowered to grant commissions to convene courts-martial, and this authority was gradually increased and enlarged by subsequent mutiny acts and Articles of War, and finally established and defined by the Army Act of 1881.

The English military tribunal having been transplanted to this country prior to our Revolutionary War, was recognized and adopted for the army by the Continental Congress in the Articles of War of 1775, in which the different kinds of courts were distinguished and their composition and jurisdiction defined. These articles were amended by those of 1776 and 1786. The first act of the Continental Congress tending to the establishment of rules and orders for the Navy of the United Colonies was passed November 24, 1775. This was subsequently modified from time to time, and finally enacted into the first act for the better government of the Navy of the United States, approved April 23, 1800. Since then articles have, from time to time, been enacted, those referring to the Army being known as the "Articles of War," and those referring the Navy as "Articles for the Government of the Navy." The articles under which naval courts now derive their power and jurisdiction are contained in the act approved July 17, 1862, and known as Section 1624 of the Revised Statutes.

NATURE OF THE COURT-MARTIAL AS A LEGAL TRIBUNAL.

By Article 1, Section 8, of the Constitution, Congress is empowered "to make rules for the government and regulation of the land and naval forces," and in pursuance of this authority it has enacted "Articles for the Government of the Navy," which contain provisions relating to the organization, jurisdiction, and other features of naval courts-martial. The Fifth Amendment, before referred to, is also frequently considered as the source of authority for courts-martial, for, as stated by Attorney-General Cushing (6th Opin., 425), this amendment "expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law," and, as was decided in the case of Trask vs. Payne, (43 Barb., 569) "this provision practically withdraws the entire category of military offenses from the cognizance of the civil magistrate, and turns over the whole subject to be dealt with by the military tribunals." This decision has only recently been confirmed by the Supreme Court in the naval case of Johnson *vs.* Sayre (158 U. S., 109).

Another authority for the creation of courts-martial is attached to the constitutional function of the President as commander-in-chief of the army and navy.

Courts-martial of the United States, have a legal sanction of equal importance with the federal courts, still, unlike the latter, they are not a portion of the judiciary of the United States, and are not, therefore, included among the "inferior courts" which Congress "may from time to time ordain and establish." In the leading case of Dynes vs. Hoover (20 Howard, 79), the Supreme Court held, referring to the provisions of the Constitution before referred to, that "these provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any con-

nection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." Again, in *Ex parte* Vallandigham (1 Wallace, 253), the court held the authority exercisable by a military commission though "it involves discretion to examine, to decide and sentence, is not judicial in the sense in which judicial power is granted to the courts of the United States." From this it appears that courts-martial, not belonging to the judicial branch of the Government, must pertain to the executive branch, and they are, in fact, *instrumentalities of the executive*, provided by Congress in order to enable him, as Commander-in-Chief, properly to command the Army and Navy and enforce discipline therein, and utilized under his orders or those of his authorized military representatives. Being a purely executive agency, which is designed for military uses, called into existence by a military order and, when its work is completed, dissolved by a similar order, it follows that the court-martial, as compared with a civil tribunal, is transient in its duration, and summary in its action; for, as stated by the Supreme Court in *Ex parte* Milligan (4 Wallace, 123), "the discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common law courts."

And, as stated by Colonel Winthrop, courts-martial unlike the superior courts of record, have no fixed places of session, no permanent office or clerk, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and their judgment is simply a recommendation, not operative until approved by a revising power. It consequently belongs to the class of minor courts of special and limited jurisdiction and scope, where competency can not be extended by implication, in favor of whose acts no intendment can be made when their legality does not clearly appear, and which can not transcend their authority without rendering their members trespassers and amenable to civil action.

Furthermore, as the court-martial is no part of the judiciary of the country, its proceedings are not subject to be directly reviewed by a Federal Court either by *certiorari*, *writ of error*, or otherwise, nor are its judgments or sentences subject to be appealed from to such tribunal. It is not only the highest but the only court by which a military offense can be heard and determined, and a civil or criminal court has no more appellate jurisdiction over offenses tried by court-martial —no more authority to entertain a rehearing of a case tried by it, or to affirm or revise its finding or sentence as such—than have the courts of a foreign nation.

In the case of Dynes *vs.* Hoover, above cited, the court held that the duly confirmed sentence of a court-martial "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever," and that with reference to the legal sentence of competent courts-martial "civil courts have nothing to do, nor are they in any way alterable by them," for "if it were otherwise the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation have been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."

In the case of Wales *vs.* Whitney (114 U. S., 564), which was a proceeding instituted against the Secretary of the Navy for the discharge on *habeas corpus* of Medical Director Wales, the Supreme Court held that "no Federal Tribunal has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try," and also that no such tribunal "is authorized to interfere with a court-martial in the performance of its duty by way of a writ of prohibition or any order of that nature."

The writ of prohibition above referred to is resorted to to prevent the doing of an act not yet performed or completed, and has never been granted in a military case in this country, nor had one been applied for in

any case pending before a naval or military court-martial before the case of Paymaster General Smith of the Navy, in which, in view of the ruling of the Supreme Court in the case of Wales *vs.* Whitney, above referred to, the writ was refused by the Supreme Court of the District of Columbia, September 25, 1885. The decision of the Supreme Court of the District of Columbia was subsequently affirmed by the Supreme Court of the United States (116 U. S. 167).

The appeal from courts-martial is vested in the President or Secretary of the Navy, the latter being assisted and advised by the Judge Advocate General of the Navy.

Although, as above stated, the civil courts have no right of entertaining an appeal from courts-martial, yet the writ of *habeas corpus* may be awarded to a prisoner claiming to be illegally detained under trial or sentence of court-martial, and in this proceeding the legality of the action of the court, *i. e.*, whether it was legally constituted, whether it had jurisdiction, and whether the sentence is one it was authorized to inflict, may be inquired into, but the action must have been absolutely illegal and void in law, before the federal courts will grant relief, for, as held by the Supreme Court in *Ex parte* Mason (105 U. S., 697), it, the Supreme Court, "has no power to review the judgment of courts-martial" and that it cannot, upon *habeas corpus*, discharge a person under sentence of court-martial, "if the court had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court could, under the law, pronounce." In *Ex parte* Reed (100 U. S., 23) the Supreme Court held that "a writ of *habeas corpus* cannot be made to perform the function of a writ of error. To warrant the discharge of a petitioner, the sentence under which he is held must be not only erroneous and voidable, but absolutely void." In Wales *vs.* Whitney (114 U. S., 575), it is held that even when the court-martial had in fact no jurisdiction the power of the

civil tribunal on *habeas corpus* "extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or revise the judgment of the military court." It was further held in this case that when the officer's arrest simply confined him to the limits of the city of Washington it was not such physical re-restraint as to be a subject of discharge on *habeas corpus*.

Inasmuch as there is no appeal to the civil courts, the judgment of a court-martial is, within its scope, absolutely final and conclusive. Its sentence, if *per se* legal, after it has received the necessary official approval, cannot be revoked or set aside, and it is only by the exercise of the pardoning power that it can, if not as yet executed, be rendered in whole or in part inoperative.

Although, as above stated, the court-martial is but an instrumentality of the executive power, having no connection with the judiciary, it is, nevertheless, within its field of action, as fully a court of law and justice as is any civil tribunal. As a court of law it is bound, like any other court, by the fundamental principles of law, and in the absence of a special provision it is to be governed in the matter of evidence by the rules of the common law courts. As a court of justice it is to decide between the United States and the accused, according to the evidence, the rules for the government of the Navy, and its own conscience.

The old-time designation of the court-martial as a "court of honor," although not often used, is still as applicable as it was formerly, because a court-martial punishes dishonorable conduct when it affects the reputation or discipline of the Navy; as, for example, a court-martial can try an officer for "conduct unbecoming an officer and a gentleman," which is an offense not cognizable in any other court of the land; and even though it does proceed on the ground of being a court of honor, it is, nevertheless, bound in its procedure by the rules of criminal pleading and evidence.

One of the greatest distinctive peculiarities of a court-martial is its dual function of judge and jury; for in its capacity of jury it takes the oath, is liable to be challenged, hears and weighs the evidence, finds the accused guilty or innocent, and is liable to be recalled to revise its proceedings; in its capacity of judge it arraigns the accused, hears and determines questions as to its own jurisdiction, hears and decides upon the competency of pleadings and testimony, sentences the accused, and finally adjourns.

In the case of the United States *vs.* Clarke (96 U. S., 40) the Supreme Court held that a court-martial is strictly a criminal court, and in fact it has no civil jurisdictiction whatsoever; *i. e.*, it can not enforce a contract, collect a debt, award damage from one to another, for all the fines which it does award inure to the Government.

CONSTITUTION OF GENERAL COURTS-MARTIAL.

The authority to constitute general courts-martial is found in Article 38 of the Articles for the Government of the Navy, which provides—

> General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President.

This article plainly designates the persons authorized to convene courts-martial, and in conformity with the concluding paragraph, it is the custom of the Navy Department to request of the President, whenever an officer is ordered to command the North Atlantic or Pacific Stations, that authority be granted him to convene general courts-martial when in the waters of the United States, and this request is invariably granted.

COMPOSITION OF GENERAL COURTS-MARTIAL.

The law which refers to the composition of general courts-martial is found in Article 39 of the Articles for the Government of the Navy, which provides—

A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried. The senior officer shall always preside and the others shall take place according to their rank.

From this it will be seen that only commissioned officers are eligible to membership of general courts-martial, the detailing of a warrant officer, cadet, petty or non-commissioned officer when the person to be tried is one of such grades, which, although authorized in European codes, has never been authorized by our law.

The only class of commissioned officers in time of peace who are exempt from this duty are retired officers who, by Section 1462 of the Revised Statutes, are not to be employed on active duty except in time of war.

The question is often asked, who are commissioned officers? and the answer is, all those who have duly received and accepted commissions appointing them to offices in the Navy. They are as much commissioned officers when they have temporary as permanent commissions. By a temporary commission I mean those which by the Constitution, the President is empowered to confer during a recess of the Senate to "expire at the end of the next session."

The question of the relative rank of members is an important one, and with a view of excluding, as far as practicable, officers who are junior to the accused it is provided that "no officer shall, when it can be avoided, be tried by officers inferior in rank," but this provision is simply directory and it is a matter entirely within the discretion of the convening authority to decide upon not only the number of officers to constitute the court, but also the rank of its members; but as a general thing, if it can be avoided, juniors should not be placed on courts to try seniors. To show that the convening authority has had in view the provision of the law just referred to, the precept should invariably state that "no other

officers can be summoned without injury to the service." Objections are often made because at least a majority of the court are not senior to the accused, and as a rule the court invariably and rightly fails to sustain such objection. The Attorney General has repeatedly decided that in no case is such an objection valid as the discretionary power of the convening authority should in no case be abridged.

Officers of one branch of the service, as the Army, are not eligible to sit as members of a court to try offenders of the Navy, and *vice versa*, the only exception being in the case of Marine officers who, when detailed by order of the President for service with the Army may be associated with officers of that service for the trial of offenders in the Army, and *vice versa*. Under similar circumstances Army officers may be detailed as members of courts to try offenders in the Marine Corps, and it may even be that in such a case the court may be composed wholly of Army or Marine officers, for the trial of persons of the Marine Corps or Army respectively.

In the case of courts-martial in the militia of the several States when called into active service, Section 1658 of the Revised Statutes provides that "courts-martial for the trial of militia shall be composed of militia officers only." The proceedings of those courts are not reviewable by the civil courts. There is no similar provision of law with regard to the naval militia recently organized, still by inference, and until there be some express provision of the law, it would follow that they should also be tried only by their own officers, that is, by a court composed of officers not necessarily of the same State, but by officers of the militia of any of the States.

NUMBER OF MEMBERS.

Article 39 of the Articles for the Government of the Navy provides *inter alia* that—

> A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many

officers, not exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court * * *

From this it is seen that the number of members is to be not more than thirteen nor less than five, and that at least the latter number is necessary to constitute a quorum for trial and judgment. Although five is all that is necessary, yet it is customary to detail at least seven members on a court so that there will be a working quorum in case of illness or absence of any member. When but five officers are ordered as members of a court the other four may deliberate on the challenge of a member and if it is sustained may meet and adjourn until the convening authority is heard from. In the same manner when at the outset a member is absent by reason of illness or for any other cause, the other four may meet and adjourn, but at least five must be present and sworn to constitute a court for the trial, and at least five must be present during the entire trial.

When there are more than five members originally the absence of one or more members does not affect its competency to proceed so long as five remain. As a familiar illustration,—a court which consisted of thirteen members may be reconvened for a revision of the sentence, and five members may so reconvene, revise the sentence, and the revised sentence is the sentence of the court. As before stated the number—within the limits of the law—to be detailed on a general court-martial is a matter of discretion with the convening authority and from his decision there is no appeal. This point was decided by the Supreme Court in 1827, in the case of Martin *vs.* Nutt.

When a general court-martial is reduced below five members it need not necessarily be dissolved, but additional members may be detailed, and when they have been sworn and taken their seats its power as a court is restored, and it may legally proceed with the trial, but the accused is, of course, entitled to challenge, and the new member or members to have all the

proceedings read over to them, the testimony of the witnesses to be read in the presence of the witnesses and the new member or members to ask such questions as they may desire; in fine, the entire proceedings are gone over again for the benefit of the new members in order that they may be perfectly *en rapport* with them.

JURISDICTION OF GENERAL COURTS-MARTIAL.

In considering the question of the jurisdiction of general courts-martial we will divide the subject into four heads.

1. The place over which such jurisdiction extends or within which it may be exercised.
2. The period of time to which its exercise is limited.
3. The persons who are subject to it.
4. The offenses which it embraces.

(1) The jurisdiction of general courts-martial is coextensive with the territory of the United States, so that no matter in what part of the United States the offense was committed, a general court-martial has jurisdiction, and in this respect it will be noted that it is different from civil courts whose jurisdiction is limited to offenses committed within certain prescribed limits of territory. Vessels of war having the right of exterritoriality, no matter where they are, they are part of the United States for this purpose. It may be well to state here that a general court-martial must never, in time of peace, be convened on foreign territory, for, if so, the proceedings are absolutely void *ab initio*. In the case of *Ex parte* Milligan (4 Wallace, 141), the Supreme court held that "wherever our Army or Navy may go beyond our territorial boundaries, neither can go beyond the authority of the President or the legislation of Congress." This jurisdiction extends to offenses committed by persons in the naval service when in occupation of insurrectionary districts, and it has been held that during the late war under such circumstances our Army was exempt from amenability to the local courts, and subject only to its own military

tribunals. Both in times of peace and war, the jurisdiction of general courts-martial extends to offenses committed on shore by persons who are within the jurisdiction of the court.

In case of permission being granted by a foreign power, with which we are at peace, for our naval force to march across its territory, the jurisdiction of a general court-martial extends to offenses committed by officers and men within the lines or within the neighborhood of the forces. This is based on the principle of exterritoriality under which, when the armies or navies of one nation are privileged to enter or pass through the country of another friendly nation, the laws of the former are deemed to continue to apply to its forces equally as if the same were within their own country. An illustration is afforded in the legal status of our Army when permitted by Mexico to cross its territory in carrying on hostilities with the Indians.

In cases where an armed force of the Navy is induced to enter a foreign power's dominion with whom we are at peace and without its authority, the question as to the jurisdiction of a general court-martial is rather an unsettled one, but most of the authorities are of the opinion that it would have jurisdiction over naval offenses committed by any of its number on the foreign soil, provided the offender was, at the time the offense was committed, a member of an organized detachment under military command and discipline. But when the offender, even though in the service, is not on the foreign soil in his official capacity, as when he is there as a deserter, he would not be within the jurisdiction of a general court-martial. A case which covers this point is one in which an officer of volunteers was tried and dismissed the Army "for violation of the sovereignty of a friendly state, in arresting a deserter from the United States forces and bringing him away from within the boundaries of Canada."

(2) The question of the time within which a naval general court-martial has jurisdiction has recently been

defined by the act of Congress approved February 25, 1895, and now known as Articles 61 and 62 of the Articles for the Government of the Navy, and which provide as follows:

ARTICLE 61. No person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.

ARTICLE 62. No person shall be tried by court-martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States, or by reason of some other manifest impediment shall not have been amenable to justice within that period, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, that said limitation shall not begin until the end of the term for which said person was enlisted in the service.

The 103d Article of War in the Army is similar to Article 61 first above quoted, and has been in force for years. It was at one time questioned whether the provision was a prohibitory restriction upon jurisdiction, or merely as providing a defense to be taken advantage of by special plea. In 1820 Attorney General Wirt held in construing the 103d Article that the limitation prescribed by the article was *absolute* and could not be *waived*; he based his decision on the ground of public policy, being intended not solely for the benefit of the accused, but to secure that prompt and certain prosecution of military offenses which is essential to maintain the discipline of the service and that, therefore, it was to be regarded as prohibitory not only upon the United States but also upon the accused.

This opinion of Mr. Wirt has been affirmed by subsequent Attorneys General and has been strictly enforced in the Army as a rule of law to which no exceptions could be admitted. Even in the case where the accused requested to waive the restriction, the

Judge Advocate General of the Army, and subsequently the Attorney General, held that it could not be done. The question has never arisen in our service, but the opinion of the Attorney General just cited would be applicable to a case in the naval service.

It may be proper to state that cases are cited in which the civil courts have, in effect, though not in terms, overruled the opinions of the Attorney General and directed that the statute of limitation of the military service, like those of the civil courts, shall act not as a restriction upon the court, but as a provision solely for the benefit of the accused of which he can take advantage by plea. It will be noted that the 62d Article makes an exception of the offense of *desertion* which all authorities agree is a continuing offense and as such that the statute does not begin to run until the termination of the term of enlistment, thus a man enlisting for three years, who deserts the third day of his enlistment, will be amenable to trial for a period of five years,—to wit, two years from the date of the expiration of the enlistment during which he deserted.

When an offense is by express provision of statute, or by implication of its terms, restricted to a period of war, the jurisdiction of a general court-martial is similarly restricted, as for example, Section 1624 of the Revised Statutes, Article 5, being the Articles for the Government of the Navy, provides as follows:

> All persons who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge.

This refers to the offense of the spy, and inferentially limits the trial by court-martial of a spy to the period of the duration of the war, so that if he is not brought to trial before the war is terminated, he cannot be tried at all. This rule was laid down *in re* Martin (45 Bart., 142, N. Y.) By the term "war" is meant

not only foreign or international war but also civil war, as well as a state of active hostilities as with an Indian tribe. In considering this phase of the subject it may be well to define when war begins and ends. An international war will generally commence to exist upon a declaration of the same in some form by Congress under the clause of the Constitution which empowers that branch of the Government "to declare war." But such a declaration is not absolutely essential, as in case our country should be invaded by a foreign foe and before Congress could be assembled, then the Executive, as Commander-in-Chief, can call forth the troops to check the invasion, and this armed meeting and resistance would constitute the commencement of "war." In case of an insurrection or rebellion the commencement of war dates from the time when it has assumed such proportions that it becomes necessary to employ the armed forces of the United States to combat and suppress it. This action is promulgated in the form of a *proclamation* or order issued by the President.

The Constitution vests the authority to make treaties in the President, "by and with the advice of the Senate," and this practically gives to him the peace-making power so far as relates to a foreign war, so that in such a case the war ends with the date of the treaty or other agreement for the cessation of hostilities, and the date is announced by executive proclamation. In case of *civil war*, a proclamation by the President announcing that the rebellion has been suppressed may be accepted as the authoritative date of the cessation of the state of war, and between these dates a status of war exists so far as the jurisdiction of courts-martial is concerned.

(3) With reference to the persons subject to the jurisdiction of general courts-martial, it may be stated that as the courts themselves owe their existence to statutory provision, they can exercise jurisdiction over such persons and offenses only as are constitutionally brought by statute within their cognizance, and these may be defined as follows:

(1) The Navy of the United States, including the Marine Corps;

(2) Certain civilians subject to naval discipline in time of war; and

(3) The naval militia when called into the service of the United States.

As especially applicable to the officers and men of the regular service, it may be well to state that, as to the period of their amenability, it is a well founded rule that it exists only during the period of service as an officer or enlisted man; *i. e.*, in the case of an officer his amenability commences from the acceptance of his commission and ends with his death, the acceptance of his resignation, or his dismissal. The same is true so far as enlisted men are concerned. In other words, so long as they are military persons they are subject to military jurisdiction.

There are a few exceptions to this rule when applied to enlisted men, and they are as follows:

(1). In case of desertion, which is a continuing offense, and and as such continues up to the date of the expiration of the enlistment and from that date the statute of two years limitation begins to run.

(2). In case of an illegal enlistment which is voidable, if after enlistment the person so enlisted deserts, he may, upon arrest be held, tried, and punished for his offense.

(3). As a general rule it has been laid down that if the military jurisdiction has once duly attached to military offenders prior to the date of the termination of their legal period of service they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This generally applies to offenses committed the last day of the enlistment. A leading case in this respect is that of *in re* Walker, in which the Supreme Court of Massachusetts in the case of a sailor in the Navy, in adverting to the injurious results that might ensue were such a person permitted to plead guilty with impunity to grave offenses on the last day of his service, adds "It is true that a seaman is not

bound to do service after the expiration of his term of enlistment. But within that term he is bound to observe the rules and regulations prescribed by law for the government of the Navy, and is punishable for all crimes and offenses committed in violation of them during this term of service." * * * In this case the petitioner was arrested or put in confinement and charges were preferred against him by the Secretary of the Navy before the expiration of his term of enlistment, and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding that the term of service had expired before the court-martial had been convened.

An exception to the question of amenability to trial by court-martial arises in the case of an officer or enlisted man who, although in the service, is duly absent from his station by leave of absence or furlough. It is apparent that these persons, during such time, cannot be guilty of a breach of discipline, neglect of duty or disobedience of orders (except one given in time of exigency to discontinue his leave), so if during such leave or furlough he commits an offense he will be amenable therefor to the civil tribunals without prior application to the military authorities. Of course, during leave of absence or furlough they can be tried by court-martial for "conduct unbecoming an officer and gentleman," "desertion," or any conduct tending to cast dishonor upon the service.

A prisoner of war in the hands of the enemy is also exempt, but of course can be tried for grossly contumacious language or injurious conduct towards another officer in the same situation.

Again, exceptions to the general rule that military jurisdiction terminates with discharge are those which are expressly provided for by statute as in the case of Articles 37 and 14, Section 1624 of the Revised Statutes, which provide—

ARTICLE 37. When any officer, dismissed by order of the President since 3d March, 1865, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if such court-martial shall not be so convened within six months from the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

The provisions of this article originally enacted during a period of war are applicable only to cases arising during war.

ARTICLE 14. If any person, being guilty of any of the offenses described in this article, while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner, and to the same extent, as if he had not received such discharge or been dismissed.

In the Army there is express legislation contained in Sections 1361 and 2824 of the Revised Statutes, which makes amenable to trial and punishment by court-martial, under the rules and articles of war, all prisoners under confinement in military prisons for offenses committed during said confinement, and also all persons admitted into the Soldiers' Home who are subject to the Articles of War in the same manner as soldiers in the Army.

There is no express legislation on this point required in the Navy, as in our service prisoners are, whilst in confinement, still in the service, and, therefore, amenable in the same manner as though on active duty, and doubtless this rule would apply to inmates of the Naval Home, although I know of no case on record where an inmate of the Home has been tried by court-martial, as the Department dismisses from that institution all those who show by their conduct that they are unworthy of the benefits which the Home gives them.

The question of the amenability to trial of an officer or man (when duly dismissed, resigned, or discharged)

for an offense committed prior to such discharge (and within two years) but not yet made the subject of charge or trial (except those just referred to) is a mooted one, and there appears to have been no adjudication on this point; but I believe the consensus of authority is to the effect that a subsequent reappointment or reenlistment would not renew the jurisdiction for past offenses, but the same would properly be considered as finally lapsed.

The question is often asked whether an officer or enlisted man can at the same time be subject to the jurisdiction of a civil tribunal and a court-martial for the same offense, and the answer is invariably in the affirmative, as has been decided by the courts in numerous adjudicated cases. Of course the civil and military courts take cognizance of different phases of the offense. Thus, an officer who has been tried and found guilty of larceny on shore, and sentenced to imprisonment, may properly be tried for conduct unbecoming an officer and a gentleman and dismissed the service. The plea of the constitutional privilege of not being twice placed in jeopardy for the same offense does not apply, as has been repeatedly held by the Supreme Court of the United States. An officer or man who has been tried by the civil authorities and acquitted may, nevertheless, be taken before a court-martial and tried and convicted of the military features of the offense.

Although there is no express legislation on the subject, I am of the opinion that the naval militia of the different states are, by analogy to the militia, amenable to trial by courts-martial (1) when employed in the federal service "in time of war or public danger," and (2) when they commit the offense of refusing to be so employed.

The question as to when the militia were to be legally regarded as in the employment of the United States was decided by the Supreme Court in the case of Houstin *vs.* Moore to be "the formal muster into the United States service at the place of rendezvous," and the

amenability continues until "discharged by proclamation of the President."

The amenability of the militia for refusal to comply with the call of the President is found in the Act of 1795, which was repeated in the Act of 1861, and found in Section 1649 of the Revised Statutes. What sort of a court-martial should try such an offender has been decided by the Supreme Court in the case of Houstin *vs.* Moore (5 Wheaton, 1, 25, 64–66), to be one composed of militia officers. This ruling has been subsequently affirmed by the Supreme Court in the case of Martin *vs.* Mott (12 Wheaton, 19, 34).

In the case last above cited the court held that the jurisdiction of the court-martial to try was not restricted to the period of war or public danger, but that the offender could be tried subsequent thereto.

CIVILIANS SUBJECT TO MILITARY DISCIPLINE IN TIME OF WAR.

In the Navy the question of the amenability of civilians to naval discipline and trial by court-martial in time of war, will arise much less frequently than in the Army, and perhaps not at all. Still as such a case might arise in landing parties, as well as naval forces serving on shore in detached parties, I have thought it best to give a brief outline of their amenability as applied to the Army.

The 63d Article of War provides:

> ARTICLE 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

This provision, coming with slight modification from the original code of 1775, which in turn was taken from the British articles of similar import, has been construed to make the persons coming within its description subject not only to the orders for the government and discipline of the command to which attached, but also to trial by court-martial for violation of the military

code. It is but proper that these people, receiving the protection of the Government, should be amenable to its rules and regulations.

The term "retainers to the camp" includes (1) officer's servants (when not enlisted); (2) camp followers attending the Army, but not in the public service. The camp followers are sutlers, and their employés, newspaper correspondents, telegraph operators, etc.

The term "Persons serving with the armies in the field" has been construed to mean those civilians who are in the employment and service of the Government. It refers to clerks, teamsters, laborers, hospital officials and attendants, interpreters, guides, scouts, as well as men employed on transports and military railroads.

Of course it has always been held that this article should be strictly construed, as it creates a certain military jurisdiction over a limited class of civilians. During our late war, however, numerous cases of this character occurred in the Army, and the jurisdiction of the court was invariably sustained so long as the civilians were "actually serving with the Army," and so long as the proceedings were instituted during the "*status belli.*"

Articles 45 and 46 of the Articles of War provide—

ARTICLE 45. Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.

ARTICLE 46. Whosoever holds correspondence with, or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.

The word "whosoever" applies with equal force to civil and military persons as has repeatedly been held by the courts after lengthy opinions on the subject.

Sections 4 and 5 of Article 4, of the Articles for the Government of the Navy provide—

The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service:

FOURTH. Who gives any intelligence to, or holds or entertains any intercourse with, an enemy or rebel, without leave from the

President, the Secretary of the Navy, the commander-in-chief of the fleet, the commander of the squadron, or, in case of a vessel acting singly, from its commanding officer;

FIFTH. Who receives any message or letter from an enemy or rebel, or, being aware of the unlawful reception of such message or letter, fails to take the earliest opportunity to inform his superior or commanding officer thereof.

It will be noted that our articles are differently worded from those of the Army last above referred to inasmuch as the army articles refer to "whosoever" does the things therein mentioned, whilst in the Navy the words "any person in the naval service" are used. I have been unable to find any decision of the courts on this point, but I am of opinion, in view of the decisions in the Army, that the courts would liberally construe these articles so as to include those civilians who are attached to the Navy and who would for this purpose be in the "*naval service.*"

As in the other sections above quoted the operation of these sections must be understood to be limited to acts committed on the theater of war or within the scope of martial law, during the *status belli.*

OFFENSES WITHIN THE JURISDICTION OF COURTS-MARTIAL.

With reference to offenses coming within the jurisdiction of courts-martial, it may be laid down as a general rule that the offenses cognizable are those made so by the Articles for the Government of the Navy or by other statutes. The Articles for the Government of the Navy define not only the specific offenses which are punishable by courts-martial, but also those which are embraced under a general description. Thus the first clause of Article 8, after mentioning falsehood, drunkenness, theft, et cetera, makes the omnibus description "or any other scandalous conduct tending to the destruction of good morals." Again, Article 22 states "all offenses committed by persons belonging to the Navy which are not specified in the foregoing articles, shall be punished as a court-martial shall direct," and

under this general description are classed such offenses as "conduct to the prejudice of good order and discipline" and "conduct unbecoming an officer and gentleman." It is proper when the articles expressly make an offense cognizable to lay the offense under that article, but when in the opinion of the convening authority, an offense has been committed which is serious enough to be tried by a court-martial, and which does not come within the specific enactment of any of the articles, it may properly be charged as "conduct to the prejudice of good order and discipline," "scandalous conduct tending to the destruction of good morals," or "conduct unbecoming an officer and gentleman."

Again, under the head of "specific offenses" we find not only those which are crimes only in the military law, but also those which are crimes in the military as well as the civil law.

The former are desertion, absence without leave, mutiny, disobedience of orders, disrespect to superior officer, sleeping on post, et cetera; the latter are larceny, crimes committed with violence, embezzlement, frauds, et cetera. It must be remembered, however, that both of these forms of offenses are both criminal and military, they are criminal, because the jurisdiction of courts-martial is criminal, and military because all offenses committed by officers and enlisted men and cognizable by courts-martial are necessarily military offenses. But though they are both criminal and military, there is this further distinction as to purely military offenses, *i. e.*, the jurisdiction of the court-martial is *exclusive*, while of the others, except in time of war in a region under martial law, the jurisdiction is *concurrent* with the civil tribunals.

The specific offenses are further subdivided into those which are peculiar to and punishable only in time of war, and those which may be committed and punished at any time, either in war or peace.

Another feature of the offenses cognizable by courts-martial is that although of a criminal character the

common law distinction between felonies and misdemeanors does not prevail. They are neither the one nor the other but simply military crimes. At common law a felony was a crime entailing a forfeiture of lands or goods, but in our country it is used to indicate a crime for which the punishment is either death or imprisonment in the penitentiary. A misdemeanor is any crime less than a felony.

At common law there is the distinction between principals and accessories, *before* and *after* the fact, but no such distinction prevails in military law, and all accused persons are treated as independent offenders, and although it sometimes happens that persons may be jointly charged and tried, as for mutiny, and each may be guilty of distinct participation calling for punishment, yet in the eyes of the military law all are principals.

Another distinction to be noted is that in courts-martial there are no statutory grades or degrees of offenses, as for instance, there are no grades of desertion, mutiny or cowardice, although the circumstances of such offenses may differ greatly in criminality and may call for very different degrees of punishment.

A point which may be adverted to in this connection is that the jurisdiction of the greater offense carries with it that of the lesser offense. Thus, a man charged with desertion of which the court has jurisdiction, implies also jurisdiction of the lesser offense of "absence without leave"—so also murder and manslaughter, or robbery and larceny. The principle upon which this rests is that the court in trying the crime charged has jurisdiction of any minor criminal act recognized as an offense by law, which it contains or involves.

RULES FOR DRAWING UP CHARGES AND SPECIFICATIONS.

At this time whilst we are considering the offenses which come within the jurisdiction of general courts-martial it may not be amiss to invite your attention to the question of the charges and specifications, the instrument by which the offense or offenses are brought

within the jurisdiction of the court. The charges and specifications in military law are similar to the indictment in a criminal case in civil law, and as this is the groundwork upon which the superstructure is built it is evident that too great care cannot be exercised in having them legally and technically correct in order that the technical demurrer or plea may properly be overruled by the court. I have, therefore, to ask your attention whilst I give a few fundamental rules bearing upon the manner of framing charges and specifications.

The officer ordering the court after assuring himself that the offense is one which should be heard by a general court-martial, should carefully digest the alleged matter so as to have it fully in hand.

The first point to be decided is the gravamen of the offense, in order that it may be properly classed under one of the Articles for the Government of the Navy. This decided, the next point to be considered is the number of specifications, and the specific matter to be charged in each specification, for care must be taken that all the rules of pleading are complied with, so that a demurrer, if offered, cannot be sustained. It will be well, in drawing up charges and specifications, to see that the following rules are strictly followed: The specifications should allege only that which is culpable and which the prosecution is ready to prove; to avoid duplicity, each specification must allege a distinct offense, and allege it in a clear and definite manner; the specification must not be argumentative; if possible it should distinctly charge some specific violation of law or regulation; the specification must be clear, brief, and explicit, in order that the facts, circumstances, and intent may be set forth with certainty and precision, and especially must it be shown that the accused committed the offense; the accused must be described with the greatest accuracy, and to this end, his christian and surname should be written in full, his rank or rating and his place of service should be dis-

tinctly stated; the time and place where the offense was committed must also be accurately set forth; but if the time or place are not absolutely known, then it is sufficiently definite to say "on or about" such a time, and "at or near" such a place, keeping in mind that only a reasonable time would be admitted as a limitation; the person against whom the offense is committed must be described with as much accuracy as the accused, but if the party is not known, then the specification may very properly allege that the offense was committed against a "person unknown"; the intent which constitutes the offense must be set forth, and when the law has adopted certain expressions to show the intent, these technical expressions must be used; the acts alleged to have been committed must be stated with certainty; the specifications must be free from abbreviations, and no part should be in figures, but the entire matter must be written out; when written instruments form part of the offense they must be set out *verbatim;* when only the substance of a written instrument is alleged it is sufficiently definite to allege it with the introductory words "in substance as follows." Each charge should be numbered, unless there is but one, and if there be more than one specification to each charge, they should also be numbered. The charges and specifications should be signed by the officer ordering the court and should be followed by his full title, and the time and place of issuing the same.

We have now traced the distinctive peculiarities of general courts-martial, and I had hoped to be able to give you a skeleton form of procedure for such courts with such comments as were deemed necessary, but in the limited time allotted me it will be impossible to do so, but it is not of importance to discuss the question of procedure of such courts at this time owing to the fact that the office of the Judge Advocate General has but recently issued an authoritative form of procedure, which as a reference book will, I think, give you all the information on this subject, especially as it is intended

to cover every possible contingency which would arise in the course of the trial.

EVIDENCE.

There is one other subject which is deserving of your very careful consideration, and which I shall be able to give but passing notice, and that is the question of evidence. You can readily see how important this matter is to officers who, as members of courts-martial, in their capacity of judges, must pass upon the *admissibility* of evidence and then as jurors weigh it. It is almost too much to ask of an officer to require him to digest the numerous and voluminous works on evidence, and yet he is often called upon to decide the most intricate points, which judges would find difficult of solution. It is a rare occurrence, however, to find grave errors committed by courts in this respect and the question is often asked how it is that laymen passing upon the rules of evidence make so few mistakes. The only answer which I can find is that the rules of evidence have as their foundation justice and common sense, so when the exact rule of evidence covering the point in question is not known, a safe course to follow would be to ask yourselves is it right that such evidence should be admitted, is it common sense that such evidence should be admitted, and if the answer be in the affirmative, the chances of error are a minimum. There are, however, a few important points to which I will ask your attention, and hope that what I say may lead you to desire a closer acquaintance with the subject which can only be gained by personal research.

Courts-martial are bound in general to observe the fundamental rules of law and principles of justice observed by the civil judicature, and are also upon trials to be governed by the rules of evidence of the common law as followed by the criminal courts of the country. But, however, as the essence of all military proceedings is summary and rigorous action, and, as before stated, courts-martial are not even courts in the full sense of

the term, but simply bodies of military men ordered to investigate accusations, arrive at facts, and when just to recommend a punishment, they can scarcely be held bound to the same strict adherence to common law rules as are the true courts of the United States, and upon trials they may properly pursue a more liberal course in regard to the admission of testimony than do the civil courts. The purpose of a court-martial is to do justice, and if the effect of a technical rule is to exclude material facts and obstruct a full investigation, the rule may and should be departed from; but it must be remembered that the proper occasions for such departures will be exceptional and infrequent.

The question of evidence may be divided into four heads, I, proof in general; II, admissibility of evidence; III, oral testimony, and IV, written testimony.

Under the head of proof in general is considered (1) what is to be proved; (2) how must it be proved; (3) what is to be presumed; and (4) what is to be judicially taken notice of.

(1). At the very outset let me remind you that in a military court as in a civil court the burden is on the prosecution to establish the guilt of the accused, and not upon him to establish his innocence. In thus establishing the guilt, it must be shown that the act charged was committed; that the accused committed it; and that he committed it with the requisite criminal intent.

(2). In a civil case the plaintiff need only make out a *prima facie* case, or to offer evidence materially preponderating over that of the defendant in order to give him a verdict, but the burden of proof on the prosecution in a criminal case is much greater, owing to the presumption of innocence which always exists, and to this presumption is due the rule of criminal evidence that the guilt of the accused must be established beyond a *reasonable doubt.* As this question of reasonable doubt is one which arises in every case at military law I will quote from Colonel Winthrop on this subject as follows: "By *reasonable doubt* is intended not fanciful

or ingenious doubt or conjecture, but substantial, honest, conscientious doubt, suggested by the material evidence in the case."

In the case of the United States *vs.* Newton, (52 Fed. R. 390) the court held that "it is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, not a doubt suggested by the ingenuity of counsel or jury and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him or those connected with him."

From these citations it will be seen that the meaning of the rule is that the proof must be such as to exclude not every possibility of innocence, but every fair and natural hypothesis except that of guilt. As stated in Greenleaf on Evidence, " What is required is not an absolute or mathematical but a 'moral certainty,' " and as laid down in Winthrop "A court-martial which acquits because, upon the evidence the accused may *possibly* be innocent falls as far short of appreciating the proper *quantum* of proof required in a criminal trial as does a court which convicts because the accused is *probably* guilty."

Under the head of "What is to be presumed," we find two classes of presumptions; those of law and those of fact. By presumptions of law are meant the general propositions established by the law, which are accepted without evidence by the courts as being *prima facie* true. These are of two kinds, those which are conclusive and those which are disputable. By presumptions of fact are meant those inferences as to the existence of a fact derived from some other fact or facts, in other words, inferences deduced by the human reason.

As to the matter of which the courts take judicial notice we find that there are many facts of a conspicuous general or public character which so authenticate themselves in law that the courts take judicial notice of their existence as matters of course and which are

not required either to be charged or proved; thus a court-martial takes judicial notice of the Constitution, public statutes, proclamations, the power of the President and executive departments, matters of public history, the Navy Regulations, general and special orders and circulars of the Department.

One of the most important subjects with which a member of a court has to deal is that of the question of admissibility of evidence, and I again urge upon you to give this matter the careful attention which it merits, as I can in this lecture give it but passing notice. The three principal rules as laid down by the authorities are (1) the evidence must be relevant, (2) the burden of proof is on the Government, (3) the best evidence must be produced of which the nature of the case is susceptible.

By being revelant is meant that the testimony must be apposite to the material averments of the specifications, and be such as to establish or tend to establish the commission of the offense alleged. It need not directly tend to sustain the charge, but if shown to be a link of the chain it is relevant and admissible.

Nothing need be said on the point that the burden of proof is on the Government, for I believe that this is thoroughly understood by all of you.

By the *best evidence* is meant not the greatest quantity of evidence, but the term applies particularly to the quality thereof. It means that the most authoritative and legally satisfactory evidence of which the case is capable is to be produced. In fine, whenever it appears that there is a higher and better grade of evidence than that which is introduced, the evidence is not admissible. A familiar example is the attempt to introduce oral or parol evidence when written evidence exists and can be produced. There are, of course, exceptions to this rule, but unfortunately time will not permit my adverting to them; but I will refer to one exception which is familiar to all of you, and that is the introduction of parol evidence to prove the contents

of a document which is lost or destroyed, or in the possession of the other side.

In connection with the requirement that the best evidence of which the nature of the case is susceptible must be produced, we must consider the subject of hearsay evidence, which, as described by Greenleaf, is "that form of evidence which does not derive its value solely from the consideration to be given to the witness himself, but rests also in part on the veracity and competency of some other person." This form of evidence is invariably inadmissible, but care must be taken in deciding that it is hearsay, for every statement made by a third person is not necessarily hearsay, but frequently original testimony and admissible. Thus, when the question at issue is whether certain words were actually spoken by a person other than the witness, a recital of the words by the witness is original testimony and admissible.

Another form of declaration of a third person which is admissible is that which forms part of what is legally known as the *res gestæ*. By *res gestæ* is meant the circumstances and occurrences attending and contemporaneous with the principal fact at issue, or so nearly contemporaneous with it as to constitute a part of the same general transaction, which explain and elucidate such fact by indicating its nature, motive, etc. No rule can be laid down which will be a guide as to what is and what is not a part of the *res gestæ*. It is a matter which must be left to the wise discretion of the court. A declaration made even a few seconds after the occurrence of a fact has been held not to be part of the *res gestæ*, whilst under other circumstances a declaration made a week or months after the fact has been held as part of the *res gestæ*. Each and every case must stand on its own bottom, and, as before stated, must be left to the sound discretion of the court, which of course is guided by the circumstances attending the case.

Courts are frequently called upon to pass upon the question of the admissibility of confessions made by the accused, and as a rule it may be stated that a confession is inadmissible unless it be clearly shown by the prosecution that it was *voluntarily* made and not induced or materially influenced by hope of release or other benefit, or fear of punishment or injury, inspired by one in authority. The court is allowed to take testimony to ascertain the absolute conditions under which a confession is made in order that it may decide as to its being a voluntary act on the part of the accused. Again, before a confession can be admitted in evidence the *corpus delicti* must be proved.

Another point which frequently arises is that which goes to the competency of a witness, and it may briefly be stated that whilst formerly many persons were deemed to be incapacitated to testify, the rules in this respect have been relaxed, and I know of no class of persons who are incapacitated to testify before a court-martial except idiots, insane persons, persons in state of intoxication, very young children, and wives of accused persons. What was formerly a question of competency is now a question of credibility, which will be later alluded to.

Formerly in criminal prosecutions the accused could not testify, but by the act approved March 16, 1878, it was provided that the "Accused shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create a presumption against him." Care must be exercised by courts that the accused does not take the stand for any purpose except at his own request, and the record must invariably show this fact, if it does not it is a fatal error. With reference to the fact that no presumption lies against the accused on account of his failure to testify, the Supreme Court held that it was not allowable to make "comment, especially hostile comment, upon such failure" to the jury. "The minds of the jurors" it was further held "can only remain unaffected from this circumstance by excluding all reference to it" (Wilson *vs.*

United States, 149 U. S., 60). In like manner it may be said that it is highly improper for the judge advocate to comment upon this fact in summing up the case for the prosecution.

The question frequently arises as to whether courts-martial being unable to secure the oral testimony of witnesses can have depositions introduced, and in reply it must be stated that depositions are inadmissible, as the law requires that the witness be sworn by the president of the court and give his testimony to the court. The Department has for the past four years at each session of Congress submitted to that body the draft of a bill authorizing courts-martial, under certain circumstances, to receive depositions, but thus far it has been unable to secure favorable action from that body on this subject.

A witness may be allowed to refresh his memory, by reference to a memorandum so long as it was made by him at the time of the fact or transaction to which it refers, or so soon afterwards as to afford the presumption that the memory of the witness was fresh at the time of making it. If the paper is not one made by the witness it must appear that after inspecting it, he can speak of his own recollection, otherwise he cannot use it. The privilege of using a memorandum does not authorize the witness to read his evidence from notes previously made.

Witnesses must confine themselves to statements of facts to the best of their knowledge and belief—opinions are not admissible except in two cases, the one being when a certain matter of fact resting wholly on belief is directly at issue, as the question as to whether a writing is or is not in the handwriting of a certain person, and the other being the testimony of experts on questions of science, or other questions requiring for their solution a peculiar skill or knowledge of a specialty.

A rule of evidence which frequently arises is that a party is not permitted to impeach the credibility of his

own witness, but this must not be construed to mean that he cannot introduce other testimony as to a particular fact which is directly contradictory to the testimony of such witness.

Another rule is that in the direct examination leading questions must not be asked except where a witness is shown to be hostile to the party calling him, or where a witnesses' memory is so defective that he cannot recollect or specify a certain material fact.

On cross-examination, however, leading questions are admissible.

The cross-examination of a witness must be confined to the matter brought out in the direct examination and must not be extended to collateral matter with a view to contradict the witness by other evidence and thus discrediting him. Of course the right of cross-examination as a test of the perception, observation, recollection, and veracity of the witness is one which should not be denied and, therefore, for this purpose great latitude should be allowed.

When the accused, at his own request, goes on the stand the greatest latitude is allowed in the cross-examination which need not be restricted to the matter brought out in the direct examination, and in fact should not be restricted in any way. Very few cases arise in which counsel for the accused do not raise objection to the cross-examination of the accused, and contend that it must be restricted in the same manner as any other witness, but this is not true, and courts would err in sustaining such objection. On this point the Supreme Court has held: "A greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses."

An established principle of the common law which has been affirmed by our Constitution is that a witness, whether the accused or any other witness, must not be required to answer a question that would criminate him; the witness can, if he desires, waive this protection.

In weighing the evidence of the accused, when a *prima facie* case has clearly been made against him by the prosecution, it is safe to rule that entire credit should not be given to his statements except in so far as he is corroborated by unprejudiced witnesses or reliable written testimony.

The question of the *credibility* of the testimony given by a witness is a most important one, for upon it rests the decision of the court in its capacity of jurors as to the proof of the various allegations. A witness is entitled to full weight for his testimony unless it can be impeached by the other party. How successful the impeachment has been made is a question entirely within the sound judgment and discretion of the court. Even when the character for veracity of a witness has been shown to be bad, his testimony is not to be wholly disregarded, but is to be considered in connection with the rest of the testimony and such credit given it as it appears to be entitled to receive. Also, when a witness has been shown to have testified falsely to a certain particular, the maxim, *falsus in uno, falsus in omnibus*, need not be applied, nor all his testimony disregarded, but it should be weighed in connection with the other testimony, and especially so when corroborated. The general manner and bearing of a witness is an important consideration in weighing his testimony.

The relative number of witnesses for the prosecution and defense is by no means decisive in general, as the relative weight of the evidence depends much less upon the number of the witnesses than upon the quality of their statements.

The question of public and private writings in evidence is a very extended one.

Public writings are generally divided into judicial records and other public documents. Judicial records are admissible under the seal of the court.

Other public documents consist of acts of the legislature and executive departments of the Government,

such as the acts of Congress and congressional debates and proceedings, executive proclamations, orders, communications to Congress. The Revised Statutes of the United States and the Statutes-at-Large are *prima facie* evidence of the law contained therein. A statute of Congress not yet published is proved by copy under seal of the State Department. General orders of the Department carry on their face their authenticity, and are receivable in evidence.

By private writings are meant contracts, deeds and other personal written instruments and obligations. The papers tendered to be introduced must be shown to be genuine, and if a copy, to be a true copy, and the handwriting must be proved.

I have endeavored to give you a brief outline of some of the more important rules of evidence, and such as most often occur in the proceedings of courts-martial, but you can easily realize that in the limited time allotted only a very superficial treatment of the subject can be given, but I trust that I have sufficiently shown the many interesting features, to offer you an inducement to continue your study of this very important subject.

With this review of the subject of general courts-martial I pass to the other tribunal of justice in the Navy—the summary court-martial.

SUMMARY COURTS-MARTIAL.

In our service summary courts-martial were first authorized by the act entitled "An act to provide a more efficient dicipline for the Navy," approved March 2, 1855, and the provisions of this act as re-affirmed in the act approved July 15, 1870, constitute the authority for the jurisdiction and powers of our present summary courts-martial.

The summary court-martial is a court of very limited jurisdiction, and is to be resorted to only in those cases where the officer ordering it believes that the offense committed is one which is deserving of greater punishment than he is by law authorized to inflict, and still

not sufficiently grave to warrant the offender being tried before a general court.

The authority for the convening of summary courts-martial is found in Article 26 of the Articles for the Government of the Navy, which provides—

ARTICLE 26. Summary courts-martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy yard, naval station, or marine barracks to which they belong, for the trial of offenses which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require a trial by a general court-martial.

This, as in general courts, plainly defines what officers are authorized to order such a court.

The composition of such courts is controlled by Article 27, which provides:

ARTICLE 27. A summary court-martial shall consist of three officers not below the rank of ensign, as members, and a recorder. The commander of a ship may order any officer under his command to act as such recorder.

The procedure to be followed by summary courts-martial is in many respects similar to that of general courts and as it is also set forth in the publication before referred to, I will simply ask your attention thereto, without in any way attempting to discuss it. It must be born in mind that so far as the suggestions for drawing up specifications and the rules of evidence are concerned they are just as applicable to summary courts as to general courts.

As has just been indicated summary courts are courts of limited jurisdiction, and in awarding a sentence they are restricted to the punishments as set forth in Article 30 of the Articles for the Government of the Navy, and here it may be well to state that one of the most frequent errors made by summary courts in awarding sentence is to combine parts of the seven punishments which they are permitted to inflict into one sentence. The decisions on this point, which are numerous, are to the effect that any one of the seven punishments may be given, but when given it must be given in its *entirety*,

to which, however, may be added extra police duties and loss of pay as authorized in the eighth clause of the Article. As a familiar illustration, the second clause of Article 30 provides for a punishment of "solitary confinement, not exceeding thirty days, in irons, single or double, on bread and water, or on diminished rations." Courts frequently award the solitary confinement on bread and water, but do not include in the sentence "*in irons*," single or double, which is a part thereof, and as a consequence such sentences are, whenever practicable, disapproved by the Department.

The action upon the record of the officer who ordered the court is so clearly defined in Articles 32 and 33 of the Articles for the Government of the Navy that a reference thereto seems to be all that is necessary.

As stated in Article 34 of the Articles for the Government of the Navy, the proceedings of summary courts-martial are to be conducted with such conciseness and precision as is consistent with the ends of justice. They are intended to be, as their name indicates, a summary method of administering justice.

COURTS OF INQUIRY.

We will now briefly review the Courts of Inquiry as they exist in our service.

The act entitled "An act for the better government of the Navy," approved April 23, 1800, provided that "courts of inquiry may be ordered by the President of the United States, the Secretary of the Navy, or the commander of a fleet or squadron, provided that such court shall not consist of more than three members, who shall be commissioned officers, and a judge advocate or person to duty as such, and such courts shall have power to summon witnesses, administer oaths, and punish contempt in the same manner as courts-martial." The act further provides that "such courts shall merely state facts, and not give their opinion unless expressly required so to do in the order for convening, and the party whose conduct shall be the sub-

ject of inquiry shall have permission to cross-examine witnesses." The provisions of this act were subsequently reaffirmed by the act approved July 17, 1862, which is the source of the jurisdiction of our courts of inquiry at the present time. The wording of the act is so clear that no comment thereon is necessary, as the source of jurisdiction, the composition and powers of such tribunals are concisely stated.

Courts of inquiry are resorted to in important cases, when the facts are various and complicated, when there appears to be ground for suspecting criminality, or when crime has been committed, or much blame incurred without any certainty on whom it ought chiefly to fall, in order to collect, sift and methodize information for the purpose of enabling the convening authority to decide upon the necessity and expediency of further judicial proceedings. It might be well to state here that the object of a court of injuiry is simply to give information to the officer ordering it, and is in no wise considered as a decision on the subject which is binding, and in its scope is not restricted by statute of limitation to any time subsequent to that at which the matter to be inquired into occurred. In fine: a court of inquiry is simply the medium through which the officer ordering it expects to get at the absolute facts in the case in order that he may determine whether or not further action may be necessary.

The composition of the court, either in regard to the rank of its members or the department of the service to which they belong, should be regulated by the circumstances to be inquired into. If the conduct or character of an officer is to be inquired into, the members of the court should not be, if possible, inferior in rank to that officer. If the officer be one of the staff corps, or the marine corps, it is proper, if the exigencies of the service will permit, that one or more officers of his corps should be detailed on the court.

As to the question of procedure of courts of inquiry I again invite your attention to the forms of procedure

before mentioned, which fully cover all the different kinds of courts of the character that can be organized. It may be well to state, however, that in one material respect this form of court differs from general and summary courts-martial, and that is that while the judge-advocate of a general court-martial and the recorder of a summary court-martial are required to withdraw when the court is closed, the judge advocate of a court of inquiry is permitted to be present at all times and does not withdraw.

It may be well to state that the court should always keep in view the fact that the purpose for which it is organized is the examination of witnesses under oath in order that the absolute facts of a case may be determined for the information of the convening authority and that the proceedings should be orderly and conform with those of other judicial bodies.

As was stated above a court of inquiry is simply convened to gather information for the convening authority, and it is entirely within the discretion of such convening authority to be guided or not by the finding and recommendation of the court, so that although a court should recommend that no further action be taken, the convening authority can nevertheless, if he deem it proper, take further action and *vice versa*.

Article 60 of the Articles for the Government of the Navy provides that—

> The record of proceedings of a court of inquiry shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial provided oral testimony cannot be adduced.

Numerous cases having arisen in which the judge advocate of a general court-martial endeavored to introduce the record of a court of inquiry as evidence before a court-martial and the court being apparently unable to decide how far the above provision of law is applicable, the Department finally, in General Court-Martial Order No. 88, dated October 21, 1895, laid down for the guidance of courts its decision in the premises,

and to this order I invite your careful attention. It is in effect that unless the charge be laid under an article for the government of the Navy, which in case of conviction, makes it mandatory upon the court to give a sentence of death or dismissal, the record of a court of inquiry is admissible in evidence provided it be shown that parol evidence can not be introduced. For the purpose of impeaching a witness it is always admissible, provided that a proper predicate be laid.

An officer whose conduct is to be investigated by a court of inquiry need not be put under suspension or arrest for that purpose; but it is proper for his superior officer to excuse him from his ordinary duties during the investigation.

The "party accused," is entitled to be present (with counsel if desired) so as to take part in the examination of witnesses, and to introduce evidence, but his presence is not at any stage obligatory or essential. He is sometimes, though rarely, ordered to be present, and in that case he must attend, although his absence may not affect the authority of the court to proceed. He may, at his own request, take the stand as a witness, but he can not be compelled to do so.

The reviewing authority, upon the receipt of the record of proceedings, may, if he deem it proper, return it to the court for revision, and, unlike a court-martial, new evidence may be received and recorded on every occasion; and the court may recall and reexamine any of the previous witnesses with a view to eliciting all possible information which the case admits.

We have now briefly reviewed the law by which the Navy, as a separate community, is governed, and also the various tribunals by which it is administered, and whilst I feel that it has been of an extremely superficial character, yet I trust that sufficient has been shown to arouse in you a desire for further research, and if I have succeeded to this extent I shall feel that my work has not been in vain. I will, therefore, in conclusion, recommend to your earnest consideration, from amongst the

numerous authorities, as books of reference, Winthrop's Military Law and Precedents; Greenleaf on Evidence; and the Forms of Procedure, issued by the Office of the Judge Advocate General of the Navy, as these will furnish substantially all the information which is necessary to the student of military law.

My thanks are due to Colonel W. Winthrop, U. S. Army, from whose valuable work "Military Law and Precedents" much of the information upon which these lectures are based was taken.